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Kumaran a/l Sappani v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–131 OF 2008 (A)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), JAMES FOONGAND HELILIAH FCJJ
9 FEBRUARY 2011

C

Criminal Law — Penal Code — s 302 — Murder — Main prosecution witness drunk at the time of commission of the offence — Whether evidence admissible — Whether evidence supported by independent evidence — Whether evidence of interested witness properly rejected — Defence of bare denial — Witness absconding — Whether adverse inference under s 114(g) of the Evidence Act 1950 arose — Whether charge proven beyond reasonable doubt

D

Criminal Procedure — Appeal — Appeal against conviction and sentence — Whether charge under s 302 of the Penal Code proven — Main prosecution witness drunk at the time of commission of the offence — Whether evidence admissible — Whether evidence supported by independent evidence — Whether evidence of interested witness properly rejected — Defence of bare denial — Witness absconding — Whether adverse inference under s 114(g) of the Evidence Act 1950 arose

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Evidence — Adverse inference — Failure to call witness — Whether adverse inference arose — Witness absconding — Explanation given by police on efforts taken to locate witness — Written statement given by witness tendered — No suppression of evidence — Adverse inference inapplicable — Evidence Act 1950 s 114(g)

G

Evidence — Witness — Credibility — Whether witness's evidence admissible — Witness drunk at the time offence was committed but was aware of happenings — Whether independent evidence supported evidence given by witness — Whether safe to convict based on witness's evidence

H

Evidence — Witness — Interested witness — Whether evidence should be accepted — Witness was brother of accused — Witness attempting to tilt evidence in favour of accused — Witness attempting to alter his previous statement

I

The appellant was originally tried with his brother ('SD2') on a charge of having killed one Suppiah Kamaraj ('deceased'), an offence under s 302 of the

Penal Code ('Code') read together with s 34 of the Code. At the close of the prosecution's case, SD2 was acquitted without having to enter a defence. The charge against the appellant was amended and at the end of the trial the appellant was convicted under s 302 of the Code. The appellant appealed, inter alia, on the ground that: (i) the prosecution's case had rested primarily on the evidence of SP12 who could recall events despite having being drunk at the material time; and (ii) there were infirmities in the cautioned statements of the appellant and SD2 (marked as exhs D2 and D3 respectively). According to the prosecution, on the day the murder took place, the appellant, SD2, SP12, one Lim Tee San ('Lim') and the deceased had consumed alcohol at a restaurant. At about midnight, they left the restaurant in the pick-up driven by the appellant. Lim was seated at the passenger side of the driver, while the deceased was lying down in the passenger cabin behind the driver's seat. SP12 and DW2 were lying down in the open air part of the pick-up. SP12 testified that, soon after, the pick up entered a dark track road and had come to a halt. SP12 saw that the appellant standing by the side of the pick-up and swinging an object towards the interior of the cabin where the deceased was lying down. He also heard the cries 'ayo, ayo'. SP12 then saw Lim, DW2 and the appellant carrying the deceased from inside of the pick-up and placing the deceased at the road side. Lim had been arrested and was released on police bond. However, Lim had absconded and in his absence a statement given by him pursuant to s 112 of the Criminal Procedure Code ('CPC') was tendered as exh D4. The post-mortem report showed that the deceased had suffered very serious head injuries. The learned trial judge found that a prima facie case had been established against the appellant and the Court of Appeal ('COA') affirmed the findings of the trial judge.

Held, dismissing the appeal and upholding the conviction and sentence:

(1) The learned trial judge had made a finding that the evidence of SP12 had support in the exh D2. Further, the relevant part of the evidence of both DW2 and DW3 lent credence to the evidence of SP12. No credible explanation was furnished by the appellant or SD2 to counter the evidence of SP12 regarding his description of what he had seen of the acts committed by the appellant (see paras 19 & 20).

(2) The relevant issues pertaining to the non production of Lim and the admission of his statement had been duly considered by the COA. D4 was admitted at the request of the defence. Hence there was no break in the chain of events or suppression of evidence that would warrant the application of s 114(g) of the Evidence Act 1950. The police had furnished an explanation of their efforts to locate Lim (see paras 22 & 23).

(3) The evidence of SD2 had been scrutinised in the light of the fact that SD2 being a brother of the appellant was an interested witness. There

were certain portions of his statements where there was an attempt to amend it during trial and this had led the trial judge to question the credibility of his statements as there was an attempt to tilt the evidence in favour of the appellant. With SD2 attempting to alter his previous written statement the evidentiary value of the statement decreased and could not therefore become positive evidence (see paras 24 & 27).

(4) Adequate consideration had been given to the defence that was raised and it had been simply described as one of complete denial (see para 34).

[Bahasa Malaysia summary

Perayu pada asalnya dibicarakan dengan saudara lelakinya ('SD2') atas tuduhan membunuh seorang Suppiah Kamaraj ('si mati'), kesalahan di bawah s 302 Kanun Keseksaan ('Kanun') dibaca bersama dengan s 34 Kanun. Pada akhir kes pihak pendakwaan, SD2 dibebaskan tanpa perlu memasukkan pembelaan. Tuduhan terhadap perayu dipinda dan pada akhir perbicaraan perayu disabitkan di bawah s 302 Kanun. Perayu merayu, antara lain, atas alasan bahawa: (i) kes pendakwaan bergantung terutamanya atas keterangan SP12 yang dapat mengingat kembali kejadian-kejadian walaupun masuk pada masa material; dan (ii) terdapat kelemahan di dalam pernyataan beramaran perayu dan SD2 (masing-masing ditanda sebagai eksh D2 dan D3). Mengikut pihak pendakwaan, pada hari pembunuhan tersebut, perayu, SD2, SP12, seorang Lim Tee San ('Lim') dan si mati telah minum alkohol di restoran. Pada tengah malam, mereka meninggalkan restoran menaiki pick up yang dipandu oleh perayu. Lim duduk di tempat duduk penumpang sebelah pemandu, sementara si mati berbaring di kabin penumpang di belakang kerusi pemandu. SP12 dan DW2 berbaring di bahagian terbuka pick up tersebut. SP12 memberi keterangan bahawa sebaik sahaja pick up memasuki jalan trek yang gelap dan berhenti. SP12 melihat perayu berdiri di tepi pick up dan menghayun objek ke arah bahagian dalam kabin di mana si mati sedang berbaring. Di ajuga mendengar jeritan 'ayo, ayo'. SP12 kemudiannya melihat Lim, DW2 dan perayu menganggkat si mati daripada dalam pick up dan meletakkan si mati di tepi jalan. Lim telah ditangkap dan dibebaskan atas bon polis. Walau bagaimanapun Lim telah telah melarikan diri dan dalam ketidakhadirannya penyataan yang diberikan olehnya berikutan s 112 Kanun Acara Jenayah ('KAJ') dimasukkan sebagai eksh D4. Laporan post-mortem menunjukkan bahawa si mati telah mengalami kecederaan kepala yang serius. Hakim bicara yang bijaksana mendapati bahawa kes prima facie telah dibuktikan terhadap perayu dan Mahkamah Rayuan ('MR') mengesahkan dapatan-dapatan hakim perbicaraan.

Diputuskan, menolak rayuan dan mengekalkan sabitan dan hukuman:

(1) Hakim perbicaraan yang bijaksana telah membuat dapatan bahawa keterangan SP12 telah menyokong eksh D2. Selanjutnya, bahagian relevan keterangan oleh kedua-dua DW2 dan DW3 telah menyokong

keterangan SP12. Tiada penjelasan yang boleh dipercayai dikemukakan oleh perayu atau SD2 untuk membalas keterangan SP12 berkaitan penerangannya mengenai apa yang dilihatnya mengenai tindakan-tindakan yang dilakukan oleh perayu (lihat perenggan 19 & 20).

(2) Isu-isu relevan berkaitan kepada ketidakhadiran Lim dan pengemukaan penyataannya telah dipertimbangkan dengan wajar oleh MR. D4 telah dikemukakan atas permintaan pembelaan. Maka, tidak terputus rantaian kejadian atau penyekatan keterangan yang mewajarkan permohonan s 114(g) Akta Keterangan 1950. Pihak polis telah mengemukakan penjelasan mengenai usaha mereka untuk mencari Lim (lihat perenggan 22 & 23).

(3) Keterangan SD2 telah di diambilkira berdasarkan fakta bahawa SD2 sebagai saudara lelaki perayu adalah saksi yang berkepentingan. Terdapat bahagian tertentu pernyataannya di mana terdapat percubaan untuk memindanya semasa perbicaraan dan ini telah menyebabkan hakim perbicaraan mempersoalkan kredibiliti pernyataannya memandangkan terdapat percubaan untuk mencondongkan keterangan tersebut dengan memihak perayu. Dengan SD2 mencuba mengubah pernyataan bertulis terdahulunya nilai keterangan pernyataan turun dan oleh itu tidak dapat menjadi keterangan positif (lihat perenggan 24 & 27).

(4) Pertimbangan yang wajar telah diberikan kepada pembelaan yang dibangkitkan dan ia semata-mata dinyatakan sebagai satu penafian lengkap (lihat perenggan 34).]

Notes

For a case on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 196.

For cases on credibility, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3029–3086.

For cases on failure to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 232–260.

For cases on interested witness, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3180–3192.

For cases on s 302, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1698–1776.

Cases referred to

Balasingham v PP [1959] 1 MLJ 193 (refd)

Francis Anthonysamy v PP [2005] 2 AMR 750; [2005] 3 MLJ 389, FC (refd)

Kenneth Fook Mun Lee v PP [2007] 2 MLJ 130; [2006] 4 CLJ 359, FC (refd)

Molu v State of Haryana AIR 1976 SC 2499, SC

Muniandy & Ors v PP [1966] 1 MLJ 257 (refd)

A *PP v Awang Raduan bin Awang Bol* [2006] 1 MLJ 332; [2005] 1 CLJ 649, FC (refd)
PP v Lo Ah Eng [1965] 1 MLJ 241 (refd)
PP v Munusamy [1980] 2 MLJ 133 (refd)

B **Legislation referred to**
Criminal Procedure Code s 112
Evidence Act 1950 s 114(g)
Penal Code ss 34, 302

C *Kumarendran (M Athimulan and Md Yunos Shariff with him) (Kumar & Co) for the appellant.*
Ahmad Bache (Deputy Public Prosecutor, Attorney General's Chamber) for the prosecution.

D **Heliliah FCJ (delivering judgment of the court):**

[1] The appellant has been convicted under s 302 of the Penal Code. He was originally jointly tried with one Poopalasingam a/l Sappani (SD2), his brother whereby the charge preferred against them reads as follows:

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> Bahawa kamu dengan niat bersama-sama pada 21 Mei 2003 jam lebih kurang 11.30 malam hingga 22 Mei 2003 jam lebih kurang 7.00 pagi bertempat di hadapan pintu pagar Ladang Gagoss Sdn Bhd Jalan Lampin, Selama di dalam daerah Larut Matang (Selama) dalam Negeri Perak, telah melakukan satu pembunuhan dengan
F menyebabkan kematian ke atas Suppiah Kamaraj, No K/P R 356565. Dengan ini kamu telah melakukan satu kesalahan di bawah Seksyen 302 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama dan dibaca bersama-sama Seksyen 34 Kanun Keseksaan.

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[2] At the close of the prosecution's case, the learned trial judge found that prima facie case had been made out against the appellant. However, the trial judge also made a finding that the prosecution had failed to establish the element of common intention under s 34 of the Penal Code and resulting in
H DW2, the brother of the appellant being acquitted without having to enter a defence. The charge against the appellant was amended and he was called upon to enter a defence. The charge reads:

> Bahawa kamu pada 21 Mei 2002 jam lebih kurang 11.30 malam hingga 22 Mei 2003 jam lebih kurang 7.00 pagi bertempat di hadapan pintu pagar ladang Gagoss
I Sdn. Bhd Jalan Lampin, Selama, Perak di dalam Daerah Larut Matang (Selama) dalam Negeri Perak, telah melakukan satu pembunuhan dengan menyebabkan kematian keatas Suppiah Kamaraj, No. K.P. R 356565. Dengan ini kamu telah melakukan satu kesalahan di bawah Seksyen 302 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

[3] The main complaint in this appeal is lodged against the evidence of the principal prosecution's witness that is one Zainol bin Saad (SP12) also known to the appellant as Non. There are also alleged infirmities in the cautioned statements of the appellant as well as that of his brother, SD2. The cautioned statements are hereinafter referred to as D2–D3 respectively. The prosecution's case also rest primarily on the evidence of SP12 who had explained that he could recall events despite allegations that he had, at the material time, been drunk.

[4] The prosecution led evidence as follows. On the material date 21 May 2003, at about 5.50pm, SP12 was at work at a car washing joint operated by SP5, the father of the appellant. Subsequently, SP12, the appellant, SD2, Lim Tee San (Lim) and SP5 left for Selama in a white pick-up truck. Upon reaching Serdang, SP5 alighted and the rest of them continued their journey to Selama where all of them assisted in clearing a todi shop belonging to the father of the appellant. The appellant and Lim then fetched the deceased, Suppiah Kamaraj after which they continued to clear the todi shop. It was in evidence that after clearing the todi shop, they all had a round of whisky.

[5] They then adjourned to a restaurant in Selama, Perak in a pick-up driven by the appellant. After having a meal at the restaurant at about 9pm, they adjourned to a seafood restaurant in Serdang, Kedah. At the seafood restaurant, it was in evidence that SP12, DW2 and the deceased consumed whisky. At about midnight, the five of them left the restaurant and the deceased then was drunk. The appellant drove the pick-up back to Selama.

[6] Lim was seated at the passenger side of the driver, while the deceased was lying down in the passenger cabin behind the driver's seat. SP12 and DW2 were lying down in the open air part of the pick-up.

[7] SP12 testified that upon reaching a bridge in Selama, SP12 was jolted by the sound of the door of the pick-up being closed forcefully. SP12 then saw that there was a road block. However, the pick-up started moving again and SP12 felt that as the pick-up preceded, it was rolling from side to side and SP12 believed that the pick-up was moving over a track road in an area that was dark. The pick-up then came to a halt but from the head lights of the pick-up, SP12 saw that the appellant was standing on the right on the right side of the pick-up and he was swinging an object towards the interior of the cabin where the deceased was lying down. He also heard the cries 'ayo, ayo'. Apparently, at that time, the right and left doors of the cabin of the pick-up were also left open. The deceased was lying in the cabin at an angle where his head was in direction of the right door. Lim was said to be standing at the left side of the pick-up where he was positioned at the foot of the legs of the deceased. DW2 at the material time was still at the back of the pick-up together with SP12. SP12 also

heard Lim shouting out 'Ane, mari tolong angkat'. SP12 also saw Lim, DW2 and the appellant carrying the deceased from inside of the pick-up and placing the deceased at the road side. They then continued with the journey in the pick-up with Lim seated at the left side of the appellant who continued to drive the pick-up.

[8] The deceased was subsequently found by someone who reported the matter to SP3 and his finding was recorded in the first information report made by SP2. The forensic pathologist, SP6 who conducted a postmortem on the deceased determined that the deceased had suffered very serious injuries at his head and his autopsy report contained, inter alia, the following report:

> PEMERIKSAAN DALAMAN
>
> Kepala
>
> Terdapat luka-luka koyak pada kulit kepala seperti yang telah dinyatakan. Tulang tengkorak di dapati telah patah terbenam pada bahagian tepi sebelah kiri seperti yang telah dinyatakan dan dari sini keretakan dilihat telah mengunjur ke hadapan dan ke kanan hingga ke tulang dahi sebelah kanan melalui dasar tulang tengkorak. Otaknya (1120 g) telah lebam dan koyak pada bahagian sebelah kiri, betul-betul di bawah luka luaran No. 6. Lebam juga kelihatan di bahagian bawah tepi otak kanan.
>
> Leher, Dada, Abdomen dan Struktur Tulang
>
> Pemeriksaan bahagian leher, dada, abdomen dan tulang tidak menunjukkan sebarang tanda kecederaan atau tanda penyakit biasa pada struktur-struktur dan organ-organ dalamnya.
>
> RINGKASAN DAN KESIMPULAN
>
> Simati telah dibawa mati ke Hospital Selama dalam keadaan berlumuran darah. Pemeriksaan bedahsiasat menunjukkan beliau telah mengalami kecederaan parah di bahagian kepalanya yang menyebabkan kematiannya. Kecederaan kepala yang dialaminya (dari kecederaan luaran No 1,2,3,4,5,6) adalah disebabkan oleh hentakan-hentakan objek tumpul dan keras. Sekiranya semua kecederaan tubuh badannya diambil kira, sekurang-kurangnya satu objek yang tumpul dan keras serta mempunyai bucu/segi telah digunakan bagi menyebabkan semua kecederaan tersebut.
>
> Tidak terdapat sebarang tanda penyakit biasa yang boleh menyebabkan atau menyumbang kepada kematiannya pada masa itu.
>
> SEBAB KEMATIAN
>
> KECEDERAAN KEPALA AKIBAT TRAUMA TUMPUL.

[9] The Court of Appeal in the grounds of judgment (per Ahmad bin Hj Maarof JCA) made the following finding (p 8 para 6):

> [6] Dalam penghakiman kami memandangkan kepada kecederaan parah yang telah dialami oleh si mati di bahagian kepalanya terutama tulang tengkorak yang patah terbenam sehingga cebisan otak dilihat keluar dari celah-celah tulang yang patah itu,

tidak syak lagi bahawa sesiapa yang menyebabkan kecederaan tersebut yang membawa maut telah melakukannya dengan niat untuk membunuh si mati. Persoalan yang timbul dalam kes ini ialah siapakah yang telah menyebabkan kecederaan tersebut?.

[10] The prosecution's reliance on the evidence of SP12 has been the subject of challenge by the defence before the High Court as well as the Court of Appeal ('COA)'. The grounds of judgment of the COA disclose that various aspects of the prosecution's case has been considered and may be detailed as follows:

(a) the credibility of SP12;

(b) the failure to produce or offer Lim as a witness; and

(c) corroboration of the evidence of SP12.

[11] The COA has subjected the evidence of SP12 to appraisal. This stems from the contention that SP12 is not a witness that has offered evidence that is credible in relation to the events that transpired and what he could have seen or heard, since, at the material time SP12 is said to be under the influence of drink. This allegation is derived from the evidence given by SP15, one of the two investigating officers in the case. According to SP15 in the course of his investigations, he had recorded a statement from the owner of the seafood restaurant in Serdang one Hong Leng Chang who had seen SP12 consuming food and the alcoholic drink Vat 69. During cross-examination by learned counsel for the defence, SP15 stated, inter alia:

… Hong beritahu Zainol Saad ada mabuk sikit dari cara dia berjalan. Pekerja restoran itu ada beritahu Zainol Saad jatuh di tepi jalan. Mereka beritahu mereka nampak dia dibawa dan diletakkan di belakang pick-up.

K: Ada pekerja En. Hong beritahu oleh kerana telah mabuk hingga Zainol Saad minum kicap.

A: Tidak ada.

Saya ada ambil statement dari seorang pekerja En. Hong yang mengatakan SP12 jatuh di tepi jalan. Namanya Eng Poh Son (lelaki).

Q: Kenapa statementnya diambil.

A: Kerana En Hong ada beritahu yang ia lihat Zainol Saad terbaring di tepi jalan depan balai polis lama. Terbaring dalam keadaan mabuk.

Jarak restoran dengan balai polis lama dimana SP12 terbaring jaraknya lebih kurang 500 meter.

Eng beritahu pick-up dibawa ke tempat dimana SP12 terbaring. SP12 naik pick-up dengan dibantu oleh seorang lelaki Cina. Lelaki Cina itu dipercayai Lim Tee San.

Eng telah disapina tetapi tidak hadir hari ini.

Pick-up itu kemudiannya ada ditahan di sekatan polis di Jalan Sri Chulan. Hanya ada satu sekatan polis saja.

Saya ada rakam statement dari anggota polis yang buat sekatan jalanraya iaitu SP8.

A further explanation is found as follows:

Q: Apa keterangan lain.

A: Keterangan yang telah diberikan oleh Lim Tee San dan saksi-saksi di kedai todi sebelum kejadian. Itu saja.

Benar, Lim Tee San telah ditangkap dan direman selama 14 hari di Balai Polis Kamunting sehingga dia dibebaskan. Soal siasat atas Lim Tee San dijalankan oleh anggota dari IPK Ipoh.

Saya tiada soalsiasat Lim Tee San. Statement Lim Tee San ada menerangkan kaitan kedua-dua tertuduh dengan kematian simati.

Q: Oleh kerana kamu tidak pernah berjumpa dengan Lim Tee San dalam tempoh reman sekiranya ia telah diseksa untuk memberi keterangan terhadap kedua-dua tertuduh, kamu tidak akan tahu.

A: Setuju.

K: Lim Tee San telah melarikan diri kerana semasa dalam reman beliau telah dipaksa memberi keterangan terhadap kedua-dua Tertuduh.

A: Tidak setuju.

Q: Kenapa tidak setuju SP12 saspek utama.

A: Beliau mabuk dan berada di belakang pick-up dan tidak tahu yang dirancangkan dan yang berlaku dalam keadaan itu. Benar, saya tidak terlibat dalam soalsiasat Lim Tee San. Saya tidak ada terima aduan dari Lim Tee San bahawa beliau telah dipukul semasa soalsiasat.

[12] The learned trial judge in his grounds of judgment reflected that he had taken into account the evidence of SP12 and the statements of Lim (exh D4) and the statements in exh D2–D3 in finding that a prima facie case had been established against the appellant. The details of the prosecution's case that are alleged to be giving rise to doubts have also been amply scrutinised by the COA in affirming the findings of the trial judge. In relation to the allegation that the consumption of alcoholic drinks by SP12 has an effect on the evidence, the COA has affirmed the finding of fact as follows:

> Setelah menimbangkan keterangan SP12 itu dan menilainya dengan keterangan-keterangan lain dalam kes ini, hakim bicara telah membuat kesimpulan fakta bahawa pada masa yang material SP12 tidak terlalu mabuk sehingga tidak sedar atau tidak mengetahui apa yang berlaku di sekitarnya, kerana dia adalah

seorang peminum minuman keras yang berpengalaman yang telah minum minuman keras sejak dari tahun 1970an lagi. Selanjutnya, hakim bicara telah menimbangkan keterangan SP12 tentang apa yang berlaku sebelum, pada masa dan selepas kejadian pada malam tersebut dan membuat kesimpulan fakta bahawa walaupun SP12 mabuk pada masa yang material, dia masih boleh mengawal dirinya dan sedar serta tahu apa yang berlaku di sekelilingnya. Hakim bicara memutuskan bahawa SP12 adalah saksi yang bercakap benar.

[13] Both the courts below have placed reliance on the decision of this court in *Francis Anthonysamy v Public Prosecutor* [2005] 3 MLJ 3890; [2005] 2 CLJ 481, *PP v Awang Raduan bin Awang Bol* [2006] 1 MLJ 332; [2005] 1 CLJ 649 and *Kenneth Fook Mun Lee v Public Prosecutor* [2007] 2 MLJ 130; [2006] 4 CLJ 359. The general principle extracted is that in any event from the evidence of experts, the blood alcohol level itself can never be conclusive to determine the degree of intoxication of the accused for different people react differently to the same blood alcohol level. In this appeal despite the urgings of counsel for the appellant, the COA applied the approach in *Kenneth Fook Mun Lee v PP*, wherein this court approved the finding of the COA in the same case as follows:

We are of the view that even if the respondent was intoxicated as found by the learned judge, on the evidence he was not in a high advanced stage of drunkenness as not to know what he was doing …

[14] The COA has further made an evaluation from the notes of proceedings recorded by the trial judge of the evidence and explanation made by SP12 where SP12 has not denied that he had consumed alcoholic drinks.

[15] SP15 (the investigating officer) himself had testified that the owner of the seafood restaurant in Serdang, by the name of Hong Leng Chang had informed him that 'Zainol Saad (SP12) ada mabuk sikit dari cara dia berjalan. Pekerja restoran itu ada beritahu Zainol Saad jatuh di tepi jalan'. The assertions made by the witness SP15 had been considered by the learned trial judge. SP12 himself in his evidence had not denied that he had consumed alcoholic drinks. The learned trial judge had also taken into account the admissions by SP12 where SP12 had stated, inter alia, as follows:

Pada malam itu saya memang mabuk tetapi boleh lagi ingat apa yang berlaku. Keterangan saya di Mahkamah dan statement kepada polis semasa reman adalah sama.

Statement saya dalam reman saya beri secara sukarela.

Q: Kamu baring balik kerana kamu dalam keadaan pening-pening.

A: Ya.

Ya, ketika itu saya dalam keadaan mabuk.

…

A

Q: Selepas keluar dari restoran seafood di Serdang kamu dalam keadaan agak mabuk.

A: Mabuklah tetapi tidak serius.

Semasa di soal semula, SP12 mengatakan:

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Q: Dalam pemeriksaan balas kamu ada kata kamu mabuk tetapi masih boleh ingat apa yang berlaku — macam mana boleh ingat.

A: Saya cuma mabuk ringan saja, masih boleh ingat apa yang berlaku.

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Saya telah mula minum arak sejak tahun 1970an tetapi tidak kuat. Mula minum dengan kuat sejak tahun 1980an.

Q: Apakah yang kamu maksudkan mabuk ringan.

A: Malam itu saya mabuk ringan. Maksudnya masih sedarkan diri. Mabuk berat lupakan diri. Bila mabuk ringan saya boleh control diri — sedar orang marah atau maki kita.

D

Kesimpulannya walaupun SP12 mabuk beliau masih boleh mengetahui apa yang berlaku kerana beliau adalah seorang 'experienced drinker' di mana beliau telah mula minum minuman keras sejak 1970an.

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[16] Learned defence counsel urges this court that the evidence of SP12 in describing the events as seen by him as incredible and further suffers from further infirmities bearing in mind that he himself had been arrested and remanded in custody. However, this aspect has also not been omitted by the

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learned trial judge in assessing the credibility of SP12. It had been contended that since SP12 had also been detained, his evidence should be suspect from the aspects of voluntariness.

[17] The COA had similarly dealt with this issue and had accepted the

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evaluation made by the learned trial judge in accepting the veracity of SP12 as a witness. The COA decided as follows:

Dalam keterangannya SP12 telah menafikan dakwaan peguam tersebut dan dia telah tidak berganjak dalam keterangannya bahawa dia bercakap benar dan bahawa

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dia memberitahu mahkamah apa yang dia nampak. Setelah menilai keterangan SP12 ketika disoal balas tentang dakwaan peguam perayu itu, hakim bicara mendapati bahawa kredibiliti SP12 tidak terjejas. Dalam pandangan kami hakim bicara berhak membuat kesimpulan tersebut. Dalam pengamatan kami, ketelusan dan kejituan SP12 memberitahu mahkamah apa yang telah disaksikannya terserlah

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apabila keseluruhan keterangan dinilai. Kami tidak mendapati apa-apa yang menunjukkan bahawa SP12 sengaja menokok tambah keterangannya untuk menguatkan lagi kes pihak pendakwaan. Misalnya dia boleh menokok tambah tentang peranan yang lebih berat dimainkan oleh tertuduh kedua dalam pembunuhan si mati. Dia juga boleh menokok tambah keterangannya terhadap perayu untuk memberatkan lagi kes terhadapnya. SP12 berpeluang berbuat

demikian tetapi dia tidak melakukannya. Misalnya, lihat bahagian berikut dalam pemeriksaan balas SP12 oleh peguam:

Q: Kamu lihat T1 menghayun tetapi tidak melihat T1 mencederakan simati.

A: Setuju.

Kepada soalan yang berkenaan SP12 boleh memberikan jawapan bahawa dia bukan sahaja nampak perayu (T1) menghayun tetapi juga mencederakan si mati. Tetapi itu telah tidak dilakukan oleh SP12. Dia memberikan keterangan tentang apa yang dapat dilihatnya dari kedudukannya di belakang pick-up tersebut. Soalan dan jawapan dalam petikan yang tersebut di atas juga memberikan satu contoh bahawa pemeriksaan balas SP12 sebenarnya menguatkan lagi keterangannya dalam pemeriksaan utama bahawa dia nampak perayu menghayun suatu objek ke dalam kabin beberapa kali. Ini menambahkan lagi kredibiliti SP12.

[18] In *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257, the Federal Court held, inter alia, as follows:

We appreciate that this court should not lightly differ from the views of the trial judge since he had the advantage of seeing and hearing the witnesses whose demeanour he was able to study in order to form his opinion as to their credibility. However, in certain circumstances, it would be right and proper to do so. As was said by Lord Green MR in *Yuill v Yuill*:

> We were reminded of certain well-known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in part on his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, albeit rarely, be deceived by a clever liar, or led to form an unfavourable opinion of an honest witness and may express his view that his demeanour was excellent or bad as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value.

In the instant case, it is stated by the learned trial judge as the ground for his belief in the main prosecution witnesses, that they had been unshaken in cross-examination. In our view, being unshaken in cross-examination is not per se an all-sufficient acid test of credibility.

[19] In this appeal, the learned trial judge has weighed the evidence of SP12 as against the evidence of not only SP15 but also the evidence of the appellant and his brother who was acquitted. The trial judge had made a finding that the evidence of SP12 has support in the exh D2, that is the caution statement given by the appellant. The contents of D2 affirms the factual events stated by SP12 in so far as the consumption of alcoholic drinks and the events are leading to the group adjourning for their return journey. Similarly, the evidence of DW2 lend support to the evidence of SP12 on the latter's consumption of alcoholic drinks. DW2 also gave evidence of the fact of the deceased being in the cabin of the motor vehicle while SP12 and DW2 were situated at the back of the car. The relevant part of the evidence of both DW2 and DW3 lend credence to the evidence of SP12 in so far as the evidence of SP12 relates to the journey that was undertaken by all five of them.

[20] In addition, the trial judge had made an evaluation of the statement of Lim Tee San (exh D4) and the evidence of SP7–SP8 (the police officers handling the road block) and traces of blood taken from the yellow pages (exh P23A) in order to arrive at a finding that the prosecution had established a prima facie case. Having acquitted DW2 on the premises that no common intention under s 34 of the Penal Code had been established, it is clear that the trial judge had also made an evaluation of the case for the prosecution once again in the context of the evidence laid out by the defence. The learned trial judge had made a determination that the defence case constituted a sheer denial of the events described by SP12. It is evident that no credible explanation was furnished by the appellant or DW2 to counter the evidence of SP12 regarding his description of what he had seen of the acts committed by the appellant. The evidence of DW2 was viewed in the context of an interested witness and was properly assessed by the learned trial judge in accordance with the principle outlined in *Balasingham v Public Prosecutor* [1959] 1 MLJ 193.

[21] The defence also assailed the evidence of SP12 when he stated the following:

> Semasa T1 menghayunkan objek saya cuma melihat Lim berdiri saja di hujung kaki si mati. Selepas T1 menghayunkan objek beberapa kali SP12 mendengar Lim berteriak 'Ane, mari tolong angkat' kepada Tertuduh 2 yang berada di belakang pick-up. Saya lihat Lim, T2 dan T1 mengangkat badan simati keluar dari cabin pick-up dan meletakkannya di tepi jalan.

[22] In the circumstances of this appeal, Lim had also been arrested and was released on police bond. However, Lim had absconded and in his absence a statement given by him pursuant to s 112 of the Criminal Procedure Code ('CPC') was tendered as exh D4 on behalf of the defence through SP15, the police officer in charge of investigations. The relevant issues of law pertaining to the non production of Lim and the admission of his statement had been duly

considered by the COA. It is noted that Lim was not charged but a statement was recorded from him as a witness. That statement was admitted at the very request of the defence.

[23] Hence there is no break in the chain of events led by the prosecution as alleged. It is also agreed that there does not occur here any suppression of evidence that would warrant the application of s 114(g) of Act 1950. The police furnished an explanation of their efforts to locate Lim. The evidence adduced from exhs D2–D4 are in consonance with the evidence of SP12 in so far as they relate to events before the road traffic block set up by the police. It is the second half of the evidence of SP 12 that is being contested.

[24] The evidence of SD2 has been scrutinised in the light of the fact that SD2 being a brother of the appellant is an interested witness. There were certain portions of his statements where there was an attempt to amend it during trial and this has led the trial judge to question the credibility of his statements as there was an attempt to tilt the evidence in favour of the appellant. The portions of his statements are as follows:

> Ketika itu Kamarajan telah minta kami menghantarnya balik ke Selama dan terus pergi dekat kereta TATA dengan membawa sebotol beer. Kemudian Kamarajan telah tidur di tengah-tengah kereta. Manakala saya dan Non telah duduk di bahagian belakang kereta itu. Kumaran telah memandu dan Lim telah duduk di sebelahnya. Kumaran telah memandu motorkar ke arah Selama. Kemudian motorkar telah berhenti kerana ada sekatan jalanraya. Masa itu Non ada buat kecoh sedikit dan saya juga turun dari kereta. Selepas itu kami telah meneruskan perjalanan. Lepas lebih kurang 15 minit perjalanan, dan dapati motorkar TATA itu telah berhenti di suatu tempat. Kemudian kereta itu telah berundur sedikit (masa itu kepala saya terantuk sedikit) dan berhenti. Selepas lebih kurang 10 minit, saya dengar bunyi pintu kereta ditutup. Kemudian kereta telah bergerak sehingga ditahan sekali lagi dalam sekatan jalanraya.

[25] In the course of the trial, SD2 was questioned on the aspect that he had the opportunity in the course of the statements being recorded from him to change or to clarify his statements. He merely denied that he had such opportunity and the trial judge noted that there were clear attempts on his part either to negate or to modify the version of his statements through oral evidence. The trial judge as well as the COA had made a specific determination as follows. The trial judge had stated:

> Apa yang jelas ialah percubaan SD2 untuk meminda percakapan di atas adalah kerana percakapan asalnya itu menyokong keterangan SP12 yang mengatakan:
>
> > Saya rasa pick-up jalan terhoyong-hayang. Saya percaya pick-up ikut jalan track, melalui jalan gelap. Bila sampai di satu tempat pick-up itu berhenti.
> >
> > (Lihat ms 43 nota keterangan.)

A Ini adalah satu percubaan oleh SD2 untuk menyelamatkan T1 dari pertuduhan membunuh. SD2 adalah saksi yang mempunyai kepentingan.

[26] The COA had determined that the finding of the trial judge with regard to the statement of SD2 as quoted above is to be supported. The relevant excerpts of the observation made by the COA is:

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> Dalam pandangan kami hakim bicara berhak membuat kesimpulan tersebut. Bagi kami apa yang jelas ialah keterangan SD2 dalam mahkamah, iaitu, 'Apa yang berlaku ialah selepas sekatan polis saya terus tertidur hingga sampai di rumah', bercanggah dengan percakapannya dalam D3 (di baris 48–53) …
>
> Dalam pengamatan kami percanggahan tersebut adalah percanggahan yang material tentang perkara penting yang menjejaskan kebolehpercayaan SD2. Perkara penting tersebut ialah apa yang berlaku selepas pick-up tersebut bergerak semula dari sekatan jalan raya polis. Menurut keterangan SP12 dalam perjalanan selepas sekatan jalan raya itulah dia rasa pick-up tersebut terhoyong-hayang dan percaya bahawa ia melalui jalan track sebelum berhenti di satu tempat di mana perayu menghayun suatu objek ke dalam pick-up tersebut beberapa kali. Seperti yang dinyatakan oleh hakim bicara dalam penghakimannya, keterangan SP12 ini disokong oleh percakapan SD2 dalam D3 seperti yang tersebut di atas. Hakim bicara memutuskan bahawa tindakan SD2 itu adalah percubaannya untuk menyelamatkan perayu dari tuduhan yang dihadapinya. Kami tidak dapat menolak rumusan hakim bicara itu sebagai tidak munasabah.

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[27] With SD2 attempting to alter his previous written statement the evidentiary value of the statement itself decreases and cannot therefore become positive evidence. As stated by Harley J in *Public Prosecutor v Lo Ah Eng* [1965] 1 MLJ 241 at p 245:

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> …; it is negative evidence in the sense that it can only be used to destroy or contradict the evidence which went before. In a sense, the previous statement is like an india-rubber — it does not produce written testimony, but merely erases the evidence given in the witness box. The earlier statement cannot be substituted for the evidence in court which is disbelieved.

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H **[28]** The above statements were made in the context of a party impeaching his own witness. There was no attempt whatever to impeach DW2 by the prosecution or the defence. Nevertheless the situation remained that there was an attempt to correct his previous statement by oral testimony.

I **[29]** The combined evidence of the appellant and SD2 had failed to establish a credible explanation as to events that transpired after the road traffic block which was confirmed in the evidence furnished by SP7 and SP8.

[30] It is relevant to note that both the courts below had determined that

there was further support of the evidence of SP12 through the evidence that was furnished by SP16, the chemist and the COA had stated the following:

> Di samping itu terdapat juga keterangan bebas yang menyokong keterangan SP12.
>
> SP16, Ahli Kimia dan pakar DNA mengesahkan darah yang terdapat pada dua contoh swab P9A adalah dari sumber yang sama dengan darah yang terdapat pada buku yellow pages (P23A) iaitu darah si mati. Ini berdasarkan laporan kimia (P30).
>
> Berdasarkan keputusan DNA ini dapat disimpulkan bahawa darah yang terdapat pada buku yellow pages itu adalah darah simati. Manakala corak atau patent darah tersebut adalah berkeadaan terpercik.
>
> Keputusan DNA ini menyokong keterangan SP12 yang beliau melihat T1 berdiri di luar tepi sebelah kanan pick-up menghayun objek seperti kayu atau besi di dalam kabin tempat duduk belakang pick-up. Ketika itu pintu belakang kiri dan kanan pick-up terbuka. Simati ketika berbaring di tempat duduk belakang dengan kepala menghala ke pintu kanan.
>
> Keterangan SP12 juga diperkukuhkan lagi dengan gambar P3K dan T yang menunjukkan buku yellow pages P23A yang mengandungi percikan darah si mati di belakang tempat duduk pemandu iaitu di sebelah kanan di mana kepala si mati berada. Keterangan ini tidak dicabar oleh pembelaan.

[31] Learned counsel for the defence has also questioned the lack of motive in the circumstances of this case. Ratanlal & Dhirajlal's, *Law of Crime*, (25th Ed), (p 1429) incorporates the following:

> Motive is the ultimate end which a person hopes to achieve whereas intention is the immediate effect of his act. Motive is something which prompts a person to form an intention. The motive behind a crime is a relevant fact on which evidence can be given. Absence of motive is also a circumstance which is relevant for assessing the evidence. Proof of motive satisfies the judicial mind about the authorship of the crime but the absence does not *ipso facto* result in the acquittal of the accused. Motive is not a *sine qua non* to prove the case of the prosecution. Absence of proof only demands deeper forensic search and cannot undo the effect of evidence if otherwise is reliable and sufficient.

[32] In *Molu v State of Haryana* AIR 1976 SC 2499, the Supreme Court observed:

> It is well settled that where the direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes more or less academic. Sometimes, the motive is clear and can be proved and sometimes, however, the motive is shrouded in mystery and it is very difficult to locate the same. If, however, the evidence of eye witnesses is creditworthy and is believed by the court which has placed implicit reliance on them, the question whether there is any motive or not becomes wholly irrelevant.

[33] For completeness it is noted that both the courts below have adequately

addressed the issue whether SP12 could be considered as an accomplice or accessory after the fact. This court does not find any reason to reconsider the issue as it would be repetitious and redundant.

[34] It is further noted that adequate consideration has been given to the defence that was raised and it has been simply described as one of complete denial. This aspect was addressed by the COA as follows:

> Perayu menafikan dia telah membunuh si mati. Perayu menyatakan bahawa dia tidak masuk kemana-mana kawasan ladang. Perayu menafikan dia telah menghayun suatu objek ke dalam kabin, mencederakan si mati atau mengangkat simati keluar dari kabin pick-up tersebut dan meletakkan si mati di tepi jalan. Dalam pemeriksaan balas, perayu mengakui bahawa SP12 tidak mempunyai sebab untuk menganiayanya kerana dia telah melayan SP12 dengan baik semasa SP12 bekerja dengannya sebagai pencuci kereta. Apabila disoal balas oleh timbalan pendakwa raya bahawa apabila balik dari Serdang dia sepatutnya menghantar si mati ke rumah bapanya di Serdang bukan di Selama, perayu menjelaskan bahawa si mati yang minta dihantar balik ke rumah kongsi kerana dia mabuk dan takut dimarahi oleh SP5. Berikutan itu timbalan pendakwa raya telah menyatakan (put) kepada perayu apabila sampai di Selama perayu tidak turunkan simati di rumah kongsi sebaliknya perayu telah bawa si mati ke Ladang Gagoss seperti yang ditunjukkan di gambar P1A-V. Perayu menjawab, 'saya turunkan simati betul-betul di hadapan pintu pagar gambar P1M'. Di hadapan pintu pagar seperti yang ditunjukkan dalam gambar P1M (pintu pagar Ladang Gagoss) bukan rumah kongsi, tetapi adalah tempat yang terletak hanya beberapa kaki dari tempat si mati ditemui oleh SP3 tertiarap di tepi jalan di hadapan Ladang Gagoss, Selama. Jika benar seperti yang didakwa oleh perayu bahawa si mati meminta dihantar balik ke rumah kongsi, perayu sepatutnya memberikan penjelasan kenapa dia telah tidak menghantar simati ke rumah kongsi. Ini telah tidak dilakukan oleh perayu.

[35] Having had a purview of the findings of the trial judge as upheld by the COA in the respective grounds of judgment, we need to echo the observation made by Hashim Yeop A Sani J (as he then was) in *Public Prosecutor v Munusamy* [1980] 2 MLJ 133; [1987] CLJ 221 (Rep):

> We have gone through the evidence thoroughly ourselves and have come to the same conclusion. Where there have been concurrent findings of facts in the lower courts it should not be made a practice in the appeal court to review these concurrent findings of facts unless it is shown that there was no evidence to support the inferences drawn in the lower courts. Two Privy Council cases are relevant on this point. This first is *Wong Thin Yit v Mohamed Ali* where in a short judgment Lord Diplock said that it was not the practice of the Privy Council to review concurrent findings of facts from courts in Malaysia and dismissed the appeal. In *Hitam bin Abdullah v Kok Foong Yee (f) & Anor* this point was dealt with in slightly more depth by Sir Harry Gibbs. In his judgment His Lordship emphasised that 'It is very well established that as a general rule, Their Lordships' Board will decline to interfere with the concurrent findings of two courts on a pure question of fact'. The judgment went on as follows:

The nature of exceptions that will justify a departure from the Board's settled practice are set out in *Srimati Bibihati Devi v Kumar Ramendra Narayan Roy* [1946] AC 508 at p 521. Lord Thankerton there said:

> That in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure.

He defined 'miscarriage of justice' and then continued:

> That the violation of some principle of law or procedure must be such erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.

[36] In conclusion and having recounted the appeal as above, it is found that there are no merits in this appeal. We are satisfied that the conviction and sentence as determined by both the courts below are to be upheld. This appeal is accordingly dismissed.

Appeal dismissed and conviction and sentence upheld.

Reported by Kanesh Sundrum